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JOHN F. DAVIS, CLERK

No. 1057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

APPLETON ELECTRIC COMPANY, a Corporation,
Petitioner,

vs.

JOHN M. JANECKO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Appleton Electric Company, a corporation, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this case on January 30, 1963.

CITATION TO OPINION BELOW

The judgment of the Supreme Court of Illinois denying petitioner's petition for leave to appeal was not accompanied by an opinion. The judgment is attached hereto as Appendix B. The opinion of the Appellate Court of Illinois, First District, Third Division, is reported at 38 Ill. App. (2d) 116, 186 N.E. (2d) 662, and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on January 30, 1963. On February 12, 1963, the Illinois Supreme Court stayed its mandate pending disposition of a petition for certiorari to this Court.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

Whether it is consistent with the due process clause of the Fourteenth Amendment for a Commissioner of the Municipal Court of Chicago to deprive petitioner of a property right after trial, where said Commissioner is not a duly elected or appointed Judge.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution Of The United States, Amendment XIV, Section 1:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

Constitution Of The State Of Illinois, Article II, Section 2:

"no person shall be deprived of life, liberty or property, without due process of law."

Constitution Of The State of Illinois, Article VI, Section 29, which provides in essence that judicial officers must be commissioned by the Governor.

STATEMENT OF THE CASE.

This action was brought by respondent to recover damages for breach of a contract of employment. Petitioner contended at trial it rightfully terminated the contract because of respondent's wrongful refusal to take a polygraph examination. After a trial before the Honorable R. A. Harewood, a Commissioner of the Municipal Court of Chicago, judgment was entered on November 2, 1960, in favor of respondent. Petitioner appealed from this order to the Appellate Court of Illinois, contending that the cause was tried before a Commissioner of the Municipal Court of Chicago and not by a judge. On appeal, petitioner further contended that under the Illinois Constitution and also Illinois case law, the Commissioner had no authority to hear and decide the case notwithstanding the fact that a stipulation had been entered into between the parties purporting to give the Commissioner authority to hear the case in question.

On April 25, 1962, the Appellate Court of Illinois, First District, Third Division, dismissed petitioner's Appeal (See Appendix A). In the opinion of the Appellate Court of Illinois, it was not necessary for the Court to decide whether a Commissioner of the Municipal Court of Chicago, had the right to act in the instant case, for the judgment order of November 2, 1960 was entered in the name of Judge Strzalka, and said order stated that he heard evidence. The Appellate Court, therefore, dismissed petitioner's appeal.

When the Appellate Court stated that the record showed that Judge Strzalka had read evidence in the instant case,

there was immediately filed, by Counsel for Petitioner, a petition supported by an affidavit, before Judge Strzalka, asking that the record be corrected in order that it might speak the truth. A photostatic copy of his petition and affidavit was attached to the motion made before the Appellate Court on May 9, 1962, as the reason for asking for an extension of time within which petitioner could file its petition for rehearing. The affidavit presented before Judge Strzalka stated in essence that the judgment order of November 2, 1960, was erroneously entered for the reason that Judge Strzalka did not hear any evidence in the case in question and in fact Judge Strzalka was not sitting in the Civil Division of the Municipal Court of Chicago on November 2, 1960, he being assigned to the Traffic Division, and in fact did not enter the judgment. The allegations contained in this affidavit were never refuted by Counsel for respondent, nor was a counter-affidavit filed.

After many hearings before Judge Strzalka, in which petitioner and respondent were represented by their respective counsel, Judge Strzalka entered an order stating that he had heard no evidence in the case in question and did not sign the order attributed to him. Armed with the foregoing, petitioner requested the Appellate Court of Illinois to grant a rehearing on petitioner's appeal maintaining as on the original appeal that a Commissioner of the Municipal Court of Chicago had entered a judgment order, and that said Commissioner was without authority to do so, since he was not a duly elected judge, or in the alternative, that he had not been commissioned by the governor of the State of Illinois.

On September 27, 1962, more than five months after its original decision, the Appellate Court of Illinois denied petitioner's petition for rehearing.

On January 30, 1963, the Supreme Court of Illinois, without opinion, denied petitioner's petition for leave to appeal.

REASONS FOR GRANTING THE WRIT.

The Court should exercise its jurisdiction in this case for the following reasons:

1. This case raises the significant question whether Illinois Courts may, consistent with the requirements of the due process clause of the Fourteenth Amendment, deprive the petitioner of its property, without the benefit of a trial before a duly elected or commissioned judge.

2. The referring of cases *en massé* to Commissioners by the Municipal Court of Chicago directly conflicts with those basic principles enunciated by the Supreme Court of the United States in the case of *LaBuy, United States District Judge*, v. *Howes Leather Co., Inc., et al.*, 352 U.S. 249, 77 S. Ct. 309 (1957), rehearing denied 352 U.S. 1019, affirming, *Howes Leather Company, Inc. and Montgomery Ward & Co., Incorporated, petitioners*, v. *Honorable Walter J. LaBuy, Respondent*, 226 F. (2d) 703 (7th Cir.) (1955).

I.

THE CAUSE WAS TRIED BY A COMMISSIONER—NOT A DULY ELECTED JUDGE. THE JUDGMENT AND ORDER OF THE COMMISSIONER IS VOID.

Petitioner and Respondent, through their respective attorneys, signed a stipulation that the cause be tried by a Commissioner duly appointed by the Court.

Though the parties stipulated and agreed that this cause be tried by a commissioner, under the law their stipulation is void and of no effect. The law is clear that

parties to a lawsuit cannot authorize nor empower any person not a judge to hear and decide a case.

The Constitution of the State of Illinois, Art. VI, Sec. 29, provides that judicial officers must be commissioned by the governor of the State of Illinois. The Commissioners of the Municipal Court of Chicago are appointed by the Municipal Court of Chicago. The Commissioners of the Municipal Court of Chicago are not elected by the people nor are they Commissioned by the governor of the State of Illinois.

In *Hoagland* v. *Creed*, 81 Ill. 506, parties to the case stipulated that a lawyer might hear and decide their case. The Supreme Court of Illinois held that judges must be chosen in the manner provided by law and that a stipulation by the parties to the effect that any person other than a judge exercise a judicial function in the case is nugatory.

In *Cobb* v. *The People*, 84 Ill. 511, the Supreme Court of Illinois said, at page 512:

> "We have said, in other cases like this, that counsel cannot clothe a person with judicial power to be executed in this mode, and we adhere to what has been said on this point."

It is respectfully submitted to this Honorable Court that due to the tremendous backlog of cases in the Municipal Court of Chicago, it has become the practice of the judges of the Municipal Court of Chicago to transfer cases *en massé* to Commissioners appointed by said judges and to have a commissioner's findings rubber stamped with the signature of a judge. The wish that the practice which has occurred for many years can be justified upon the ground that to upset it would interfere with the stability of the Municipal Court of Chicago, nevertheless, does not

make this practice valid nor does it confer authority upon a commissioner or commissioners of the Municipal Court of Chicago to hear the case in question.

As will be more fully developed in Point II of this Petition, the referring of cases *en masse* violates principles of law as enunciated by the Supreme Court of the United States.

Since the practice of referring cases to the Commissioners of the Municipal Court of Chicago violates the provisions of the Constitution of the State of Illinois, Article VI, such violation is tantamount to petitioner, of a denial of Due Process of Law respecting petitioner's property as guaranteed by the Constitution of the United States, Amendment XIV, Section 1, and the Constitution of the State of Illinois, Article II, Section 2.

II.

THE REFERRING OF CASES EN MASSE TO COMMISSIONERS BY THE MUNICIPAL COURT OF CHICAGO DIRECTLY CONFLICTS WITH THOSE BASIC PRINCIPLES ENUNCIATED BY THE SUPREME COURT OF THE UNITED STATES IN LA BUY, UNITED STATES DISTRICT JUDGE, v. HOWES LEATHER CO., INC., et al., 352 U.S. 249, 77 S. Ct. 309 (1957).

In *LaBuy, United States District Judge, v. Howes Leather Co., Inc. et al.*, 352 U.S. 249, 77 S. Ct. 309, the Petitioner who was a Federal District Judge had referred under Rule 53 (b) of the Federal Rules of Civil Procedure, two civil antitrust actions brought by private parties to a master for hearing and the preparation of findings of fact and conclusions of law. As exceptional conditions requiring the references, the district judge cited an extremely congested calendar, the complexity of the cases and the fact that they would take considerable time to try.

The United States Court of Appeals for the Seventh Circuit in *Howes Leather Company, Inc., et al.* v. *Honorable Walter J. La Buy*, 226 F. (2d) 703 (7th Cir.) 1955, held that the references were improper and entered an order of mandamus compelling the district judge to vacate his orders of reference to a master and in effect requiring the district judge to himself hear the parties' cases.

The foregoing decision of the United States Court of Appeals for the Seventh Circuit was affirmed by the Supreme Court of the United States in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 77 S. Ct. 309. While the Supreme Court of the United States does not specifically speak of the fundamental protection of due process of law which is guaranteed all litigants in State Courts by the Fourteenth Amendment of the Constitution of the United States, nevertheless the language of the Supreme Court leaves no doubt that such protection is implied in its decision. For, the Court held that the use of masters is to aid judges in the performance of specific duties as they arise in the progress of a cause—not to displace the Court. The length of time for trial, the congestion of the Court call and the complexity of the case itself were not, even when considered in their totality, reasons for permitting a court to refer a case to a master.

In the instant case, it is true that the parties had stipulated that the Commissioner could hear the case, but it is respectfully contended that for reasons advanced under Point I of this Petition, such stipulation did not confer any jurisdiction on the Commissioner. (*Constitution of the State of Illinois*, Art. VI, Sec. 29; *Hoagland* v. *Creed*, 84 Ill. 506; *Cobb* v. *The People*, 84 Ill. 511.

For example, if parties conferred diversity of citizenship jurisdiction on Federal Courts, when diversity in fact did not exist, it is respectfully submitted that the lack of proper jurisdiction could be raised via appeal.

In the instant case, the abuse of denying litigants access to a judge or judges is more pronounced than in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 77 S. Ct. 309. The Municipal Court of Chicago has largely defended its policy of referring cases *en masse* to Commissioners on the ground of calendar congestion. In the recent case of *United States* v. *Hall*, 274 F. (2d) 856, 858 (9th Cir.) 1960, the Court held that a condition of calendar congestion alone is not justification for a reference to Commissioners under the Rule. (Citing *United States* v. *Kirkpatrick*, 186 F.(2d) 393 (3 Cir.) 1951).

It is respectfully submitted that a denial to litigants of a trial by duly elected or appointed judges is a denial of due process of law.

In *Pembleton* v. *Illinois Commercial Men's Assoc.*, 289 Ill. 99, 124 N.E. 355 (1919), the Supreme Court of Illinois held that State decisions as to Due Process of Law must be controlled by decisions of the Federal Courts.

It is respectfully submitted that decisions of the Federal Courts leave no doubt that referrals by a Court *en masse* to persons whether they be Commissioners or Masters does not allow to litigants their day in Court.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, this petition for Writ of Certiorari to review the judgment of the Supreme Court of the State of Illinois should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF THE APPELLATE COURT

48408

John M. Janecko, Appellee,) Appeal from
) Municipal Court
v.) of Chicago.
Appleton Electric Company, a corporation, Appellant.)

MR. PRESIDING JUSTICE MCCORMICK DELIVERED THE OPINION OF THE COURT.

The plaintiff brought an action in the Municipal Court of Chicago to recover certain salary allegedly due him under a contract with the defendant. The defendant filed a defense to the statement of claim. On November 2, 1960 the parties entered into a stipulation that the case might be tried by a court appointed commissioner, that a jury be waived, and that the cause be submitted for hearing and disposition to the assigned commissioner. The cause was assigned to Commissioner Harewood. The parties presented a stipulation of facts to the commissioner. No other evidence was heard, and the commissioner, after hearing arguments of counsel, stated he would "rule for the plaintiff; judgment in the amount prayed for." The hearing was on November 2, 1960. On the same day the record shows a judgment order entered in the cause by C. J. Strzalka, one of the judges of the Municipal Court. That order recited:

> "• • • this cause comes on in regular course for trial before the Court without a jury and the Court having heard the evidence and the arguments of counsel, and

being fully advised in the premises, enters the following finding, to-wit:

> "'The Court Finds the Issues against Defendant, Appleton Electric Co., Inc., a Corp., and Assess Plaintiff's Damages at the Sum of Six Hundred Dollars ($600.00)'.

"This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the finding herein and that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendant, Appleton Electric Co., Inc., a Corp., the damages of the plaintiff amounting to the sum of Six Hundred Dollars ($600.00) in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor.

"Supersedeas Appeal Bond set at One Thousand Dollars ($1,000.00)."

Defendant served notice upon the plaintiff that on the 17th of November he would appear before Commissioner Harewood and present a motion to reopen proof. The record further shows that on December 16, 1960 Judge Joseph F. Geary, one of the judges of the Municipal Court of Chicago, denied defendant's motion to reopen proof. A transcript of the proceedings before the commissioner was prepared and was certified to by him on January 12, 1961. The sheet of the record which bears the certification of the commissioner also has the statement, over the signature of Daniel J. McNamara, one of the judges of the Municipal Court of Chicago: "Approved only for purpose of entering order on half sheet."

At the time of the hearing before the commissioner the attorneys for the plaintiff and defendant stipulated that the decision of the commissioner would be as binding as

that of a judge and that either side would have the right to take an appeal to the Appellate Court.

Defendant filed a notice of appeal December 19, 1960. In the notice of appeal defendant states that it appeals from the order of Commissioner Harewood, "which order found the issues in favor of the plaintiff, John M. Janecko, and entered judgment in favor of said plaintiff in the amount prayed for," and from the order of the commissioner denying its post-trial motion to reopen proofs. The record does not show that any such orders were entered by the commissioner.

In its brief the defendant first argues that the cause was tried before a commissioner of the Municipal Court and not by a judge, that the commissioner had no authority to hear and decide the case, and that the stipulation of the parties purporting to give the commissioner authority was of no force and effect.

Section 74 of the Practice Act (Ill. Rev. Stat. 1959, chap. 110, par. 74) provides that alleged errors can only be brought before a reviewing court by notice of appeal and that the review constitutes a continuation of the proceedings in the trial court. Section 76, after setting out the requirements for filing a notice of appeal in the trial court, provides that the appeal is perfected when the notice of appeal is filed in the trial court and that the notice of appeal is jurisdictional. *Pruitt* v. *Motor Cargo, Inc.*, 30 Ill. App.2d 222, 173 N.E.2d 851 (1961); *Freeport Motor Casualty Co.* v. *Tharp*, 406 Ill. 295, 94 N.E.2d 139 (1950). Supreme Court rule 33 sets out the form and contents of the notice of appeal and in that rule it is provided that the notice shall specify and describe the order, determination, decision, judgment or decree which is being appealed from, and if the appeal is from a part thereof only it shall specify

what part. The notice of appeal, which is jurisdictional, limits review to the judgment or other orders therein set out. In *People* v. *N. Y. C. R.R. Co.*, 391 Ill. 377, 63 N.E.2d 405 (1945), the court says:

> "The purpose of a notice of appeal under our practice is to inform the party in whose favor a judgment or decree has been rendered that the unsuccessful party desires a review of the case by a higher tribunal. *If, when considered as a whole, the notice fairly and adequately sets out the judgment or decree complained of, or the part thereof objected to, the court to which the appeal is to go, and the relief sought from the reviewing court, in such a way that the successful litigant may be advised of the nature of the proceedings, the absence of strict technical compliance in connection with the form of the notice should not be fatal.* • • • We are not concerned here with the complete failure of the party appealing to take some step or do some act made necessary by statute or rule to perfect his appeal. Rather we must decide whether the notice here, admittedly deficient in form, was a sufficiently substantial compliance with the requirements of Rule 33." (Italics ours.)

Section 77 of the Practice Act provides that appeals will lie only from final judgments or decrees. *Kramheer* v. *Canning*, 33 Ill. App.2d 208, 178 N.E.2d 147 (1961); 2 I.L.P. Appeal and Error, sec. 103. In *Peterson* v. *Grisell*, 330 Ill. App. 587, 71 N.E.2d 832 (1947), the court says: "For this Appellate Court to properly entertain an appeal, there must be presented to it a final appealable order entered by the court below." It is true that it has been held that since the adoption of the Practice Act no specific assignment of errors, such as was required under the former Practice Act, is necessary in a court of review. *Trust Co. of Chicago* v. *Iroquois Auto Ins. Underwriters, Inc.*, 285 Ill. App. 317, 2 N.E.2d 338 (1936). Rule 39 of the Supreme Court

provides that neither an assignment nor a statement of errors is necessary in the brief, nevertheless the errors relied on must be pointed out and argued in the brief. No errors can be argued in the brief which do not go to the validity of the judgment or orders set out in the notice of appeal.

In this case the appeal is not taken from a final order. This is evident from the record showing the judgment order of Judge Strzalka. Had the appeal been taken from the judgment of Judge Strzalka, nevertheless, on the record before us the defendant could have fared no better. A reversal by this court must necessarily be based on the defendant's argument that the intervention of Commissioner Harewood in the case in considering evidence, making a finding and referring it to the judge was invalid because he had no authority to so act and that as a result the judgment entered by Judge Strzalka must fall. This would only be true if the proceedings before Commissioner Harewood were without legal authority and void and where the court heard no evidence; but if we assume, without deciding the question, that Commissioner Harewood had no right whatsoever to act in the case, the judgment order entered by Judge Strzalka states that he heard evidence. This statement that there was evidence presented to him in open court and that he was not relying solely upon the recommendation of Commissioner Harewood is controlling on us. We have no transcript of the proceedings before the trial judge and we must presume that he heard sufficient evidence to justify the entry of the judgment. *McGurn* v. *Brotman*, 25 Ill. App.2d 294, 167 N.E.2d 12 (1960); *County Board of School Trustees* v. *Bendt*, 30 Ill. App.2d 329, 174 N.E.2d 404 (1961); *Smith* v. *Smith*, Gen. No. 48482, opinion filed by this court March 28, 1962, and cases cited therein.

In *County Board of School Trustees* v. *Bundt*, *supra*, the court says:

> "It is basic in our law that it is the record in the trial court that we review. That record imports verity.
>
> "'When properly authenticated the record filed for the purpose of appeal imports absolute verity, and is the sole, conclusive and unimpeachable evidence of proceedings in the lower Court.' *McGurn* v. *Brotman*, 25 Ill. App.2d 294, 167 N. E. 2d 12.
>
> It is not for counsel by unsupported statements in either his brief or argument to impugn, stultify or impeach that record in this Court. An Assignment of error must be grounded on the record itself and not on the arguments of counsel or his statement in his brief on appeal. *Berdelle* v. *Carpentier*, 11 Ill. 2d 295, 143 N. E. 2d 53; *Keser* v. *Corrie*, 3 Ill. App. 2d 209, 120 N. E. 2d 880; *People* v. *Belmont Radio Corporation*, 338 Ill. 11, 57 N. E. 2d 479. It was in the trial court that the picture we now examine was painted. It was in that court through appropriate proceedings that it could have and should have been retouched or refinished to correctly portray the view, if it does not now do so. It is sound juridical philosophy which inhibits us from negating, through guess, surmise or conjecture, that which the record as it now stands affirmatively asserts. The absence of evidence in the abstract or the record, standing alone, is insufficient to raise a presumption that none was heard when the recitals of the judgment order itself belies the presumption. The record on appeal binds the parties and circumscribes us in the consideration of the appeal."

Defendant's appeal is dismissed on the ground that it was not taken from a final order entered in the trial court.

APPEAL DISMISSED.

DEMPSEY and SCHWARTZ, *JJ.*, CONCUR.

APPENDIX B

Be It Remembered, that, to-wit: on the 30th day of January, 1963, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

John M. Janecko, Respondent, vs. Appleton Electric Company, a corporation, Petitioner.	Petition for Leave to Appeal from Appellate Court. First District 60 M 106761 48408

No. 37588

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by him in this behalf expended, to be taxed, and that he have execution therefor.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this ..... day of ..... 19.....

Clerk,
Supreme Court of the State of Illinois

And afterwards, to-wit: on the 14th day of February, A.D. 1963, the same being one of the days in vacation after the Term of Court aforesaid, there was filed in the Office of the Clerk of the Supreme Court a certain order entered by Justice Ray I. Klingbiel staying the mandate pending application by the petitioner for a writ of certiorari to the Supreme Court of the United States, said order being in the words and figures following, to-wit:

IN THE

SUPREME COURT OF ILLINOIS

John M. Janecko, Respondent, vs. Appleton Electric Company, a corporation, Petitioner.	Petition for Leave to Appeal from Appellate Court. — First District 60 M 106761 48408
No. 37588	

ORDER.

This Cause Coming On To Be Heard, and the Court being fully advised in the premises thereof;

It Is Hereby Ordered that the mandate of this Court be and the same is hereby stayed pending application by the Petitioner, Appleton Electric Company, for a Writ of Certiorari to the Supreme Court of the United States.

/s/ Ray I. Klingbiel
Justice

Dated: Feb. 12, 1963